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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No.

NATIONAL REPUBLICAN PARTY and
REPUBLICAN NATIONAL COMMITTEE,
Conditional Cross-Petitioners,
v.

THE RIPON SOCIETY, INC., *et al.*,
Respondents.

**CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT**

The National Republican Party and the Republican National Committee petition, conditionally, for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case. The judgment below was favorable to the present cross-petitioners, and they do not seek to change that judgment. This cross-petition is filed only to protect the right of the cross-petitioners to rely on certain defenses and

arguments in support of the judgment below, in the event that the Court grants the petition which has been filed in the case of *Ripon Society v. National Republican Party*, No. 75-884. The present cross-petitioners are opposing that petition, and if that petition is denied, then the present cross-petition should be denied.

OPINIONS BELOW

The opinion of the District Court is reported in 369 F. Supp. 368. It is set out at pages 1-16 of the Appendix in No. 75-884.

The opinion of a division of the Court of Appeals, and the opinions rendered by the judges of the Court of Appeals sitting *en banc* have not been officially reported. They are included in the Appendix which has been filed in No. 75-884 at pages 19-65, and pages 68-170, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1975. It is printed at pages 171-172 of the Appendix filed in No. 75-884. On December 21, 1975, the Chief Justice entered an order extending the period for filing this cross-petition until January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision by a political party with respect to the apportionment of delegates at a national convention involves state action.

2. Whether the District Court had jurisdiction of this case under 28 U.S.C. 1343(3) or otherwise.

3. Whether the issue presented in this case presents a justiciable question which can properly be decided by a court.

4. Whether the Ripon Society, and the individual petitioners, have the requisite standing to raise the issue presented by the petition.

5. Whether the question presented in the petition is now moot, so that the petition seeks, in effect, an advisory opinion, which is beyond the jurisdiction of the federal courts.

STATEMENT OF THE CASE

The facts relating to the merits of this case are stated in RNC's opposition to Ripon's petition for certiorari and need not be repeated here. This cross-petition is filed for two purposes:

(1) to preserve the right of the National Republican Party and the Republican National Committee to raise certain issues and questions in support of the judgment below; and

(2) to avoid the necessity of complex and often elusive procedural arguments as to the right of the present cross-petitioners to rely on these questions in the event that certiorari is granted in No. 75-884. See

Stern, "When to Cross-Appeal or Cross-Petition — Certainty or Confusion?", 87 Harv. L. Rev. 763 (1974); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, at 226 n. 2; *International Ladies Garment Workers v. Quality Manufacturing Co.*, 420 U.S. 276 at 280-281 n. 2.

ARGUMENT

The present cross-petitioners oppose the granting of the writ of certiorari applied for by the Ripon Society and others in No. 75-884, and have filed a Brief in Opposition there. If that petition is denied, this cross-petition should be denied. However, if Ripon's petition is granted, then the present cross-petition should be granted, in order to eliminate any question as to the right of the cross-petitioners to rely, in support of the judgment below, on certain arguments which were presented in the court below. A further question — mootness — has arisen since the decision of the court below.

These several questions may be briefly summarized as follows:

1. *State Action*. In the court below, the petitioners in No. 75-884 contended that the allocation of convention delegates by a national political party constitutes "state action" so as to bring the case within the provisions of the Fourteenth Amendment. The court below discussed this question (App. 77-81 in No. 75-884), but then said: "... we decline to decide it" (at 81) since "it is clear to us that plaintiffs' case must fail on its merits without regard to whether or not

there is state action, a question which we therefore expressly reserve."¹

Should there be a different view of the merits of the case, the cross-petitioners should be in a position to raise the question of state action. It is not known whether they can, without a cross-petition, rely here on a question in defense of the judgment below which was *not* decided there. If the petition in No. 75-884 is granted, then the granting of this cross-petition will make it possible to present this issue, without having to engage in elaborate discussion of uncertain procedural questions.

2. *Jurisdiction.* In the court below, the cross-petitioners contended that there was no statutory basis for jurisdiction of this case in the District Court. The court below discussed this question in its opinion, Appendix 81-82, n. 26. However, the court below said that it would "assume rather than hold," the question of the interrelation of §1343(3) and state action, as indicated above, and that accordingly "we reserve also the question of jurisdiction under §1343(3)."²

3. *Standing.* The court below held that the individual plaintiffs had standing to raise the issues involved in this suit. This question is discussed at App. 72-75. The

¹Judges Tamm and Robb (App. 109, 113-121, 172) and Judges Wilkey and Danaher (App. 128-135) concluded that there was no "state action." Only Chief Judge Bazelon (App. 150-152) decided that the requisite "state action" was present.

²Closely related to the issue of jurisdiction is the question of the capacity of the National Republican Party to be sued, in view of the fact that it has no juristic existence, and is simply a convenient short-hand for a collection of state and territorial Republican Parties. This question is discussed, and resolved, adversely to the contention of the petitioners, at App. 72, n. 5. It is mentioned here so as to preserve the question if certiorari should be granted in these cases.

cross-petitioners will want to rely on this issue if certiorari should be granted in these cases.³

The principal plaintiff here is the Ripon Society which, as the court below said, (App. 75) "claims no harm to itself, nor even to any interest to which it is particularly dedicated." Whether the Ripon Society has standing was, said the court below (App. 76), "a question which we need not decide in this case."⁴ If certiorari is granted by the Court, this question should be available to the present cross-petitioners.

4. *Justiciability*. The issue of justiciability is at the heart of this case. It is discussed by the court below at App. 82-84, where the court indicated considerable doubt about the appropriateness of the issues here for court decision, that is, about their justiciability. However, in view of its holding on the merits, the court below declined to decide the issue of justiciability.⁵

³The petition should surely be dismissed with respect to the plaintiff Behn, who has moved from Massachusetts, since the judgment of the District Court. See Petition in No. 75-884, p. 3, n. 1. Similarly, as the court below indicated (App. 74-75, n. 8), there is a special question as to the standing of the petitioner Gillette, since he is a resident of the District of Columbia which he claims is over-represented by the convention formula.

⁴Judge Mackinnon (App. 108) and Judge Danaher (App. 159) concluded that the Ripon Society had no standing. Only Chief Judge Bazelon (App. 149) concluded that the Ripon Society did have standing.

⁵Judge Tamm (App. 121-126), Judge Robb (App. 172) and Judges Wilkey and Danaher (App. 127, 135-146, 164-170) concluded that the issues were not justiciable. Only Chief Judge Bazelon concluded that the issues were justiciable. (App. 152-153).

This issue should be preserved if certiorari is granted in these cases.

5. *Mootness.* The issues raised in this case are now moot. The call for the convention has gone out, and it is no longer possible to change the allocation of delegates. Accordingly, the present case should be dismissed.

This fact is acknowledged in the Petition in No. 75-884. See Pet. 25-26. This question is further discussed in the Brief in Opposition. It is presented here only to be sure that it will be available to the cross-petitioners in the event that certiorari is granted in these cases.

CONCLUSION

The petition for certiorari in No. 75-884 should be denied, for the reasons stated in the Brief in Opposition. If that petition is denied, then the present cross-petition should be denied. In the event that the petition in No. 75-884 is granted, however, the present cross-petition should be granted in order that all issues may be fully presented to the Court, and in order to avoid the necessity of essentially fruitless discussion of procedural questions as to the availability of these issues to the cross-petitioners.

Respectfully submitted,

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